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In the Supreme Court of the United States

OCTOBER TERM, 1973

HENRY HERNANDEZ, ET AL., PETITIONERS

v.

VETERANS ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-700

HENRY HERNANDEZ, ET AL., PETITIONERS

v.

VETERANS ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the district court (Pet. App. C) is reported at 339 F. Supp. 913. The opinion of the court of appeals (Pet. App. A) is reported at 467 F. 2d 479.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1972. The petition for a writ of certiorari was filed on November 7, 1972, and was

granted on May 14, 1973.[1] This Court's jurisdiction rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the statutory prohibition against judicial review of the decisions of the Veterans Administration bars review of the contention that the statute under which the Veterans Administration denied educational benefits to petitioners is unconstitutional.

2. Whether, in any event, the dismissal of petitioners' actions was correct since their constitutional challenges to the Veterans Readjustment Benefits Act were insubstantial.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.

The Fifth Amendment provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

38 U.S.C. 211(a), as amended, provides:

> On and after October 17, 1940, except as provided in sections 775, 784, and as to matters

[1] The Court's order also sets the present case for argument with No. 72-1297, *Johnson* v. *Robison*.

arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

38 U.S.C. 1652(a)(1) provides:

The term "eligible veteran" means any veteran who (A) served on active duty for a period of more than 180 days any part of which occurred after January 31, 1955, and who was discharged or released therefrom under conditions other than dishonorable or (B) was discharged or released from active duty after such date for a service-connected disability.

38 U.S.C. 1661(a) provides:

Except as provided in subsection (c) and in the second sentence of this subsection, each eligible veteran shall be entitled to educational assistance under this chapter for a period of one and one-half months (or the equivalent thereof in part-time educational assistance) for each month or fraction thereof of his service on active duty after January 31, 1955. If an eligible veteran has served a period of 18 months or more on active duty after January 31, 1955, and has been released from such service under conditions that would satisfy his active duty obligations, he shall be entitled to educational assistance under this chapter for a period of 36

months (or the equivalent thereof in part-time educational assistance).

38 U.S.C. 101(21) provides, in pertinent part:

> The term "active duty" means—
> (A) full-time duty in the Armed Forces, other than active duty for training;
>
> * * * *

STATEMENT

Petitioners were exempted as conscientious objectors from induction into the armed forces, and performed civilian alternative service pursuant to Section 6(j) of the Selective Service Act, 50 U.S.C. App. 456(j), and the governing regulations of the Selective Service System, 32 C.F.R. Part 1660 (1971).[2] Upon completion of that service, petitioners sought educational benefits pursuant to the Veterans Readjustment Benefits Act of 1966, 38 U.S.C. 1651-1687. The Veterans Administration denied benefits since,

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[2] Section 6(j) of the Selective Service Act recognizes two kinds of conscientious objectors:

1. Persons who, while opposed to participation in war, may be inducted into the armed forces to perform noncombatant service (see 32 C.F.R. 1622.11).

2. Persons who, in addition to their opposition to participation in war, also oppose noncombatant service. They are not subject to induction into the armed forces but may be required to perform civilian work ("alternative service") that contributes to "the maintenance of the national health, safety, or interest * * *" (see 32 C.F.R. 1622.14, 1622.16).

All references herein to C.F.R. are to the 1971 edition, which contains the regulations in effect during petitioners' alternative service.

under the Act, they can be paid only to veterans who have served on active duty. 38 U.S.C. 1652(a)(1), 101(2) and (21).

Petitioners then instituted the present actions to compel payment to them of the educational benefits available to veterans. They contended that the Act violates due process in not providing benefits to them, while providing such benefits to veterans who have served on active duty in the armed forces; they further argued that the statute abridges their freedom of religion as guaranteed by the First Amendment (R. 8; Miller Compl. p. 6, para. VII(6)). Petitioners sought, *inter alia*, declaratory and injunctive relief, and requested the convening of a three-judge court.

The district court dismissed the actions (Pet. App. C), holding that judicial review of the Veterans Administration determinations of petitioners' ineligibility for benefits was explicitly precluded by 38 U.S.C. 211(a). That Section provides that "decisions of the Administrator on any question of law or fact * * * shall be final and conclusive and no * * * court of the United States shall have power or jurisdiction to review any such decision * * *." The court further found that petitioners' various constitutional challenges to the Veterans Readjustment Benefits Act were "insubstantial and without merit" and thus did not warrant the convening of a three-judge court (Pet. App. C 24).[3]

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[3] The district court rejected petitioners' due process challenge to the Act since the "classification scheme is neither arbitrary or unreasonable" (Pet. App. C 23). The court

The court of appeals affirmed the dismissal of the action for lack of jurisdiction under 38 U.S.C. 211 (a), stating (Pet. App. A 16):

> Assuming without deciding that the Veterans Administration might take an action so egregiously discriminatory and procedurally unfair as to require a judicial re-examination of the constitutionality of the quoted section, the facts alleged in the present case do not present a substantial basis for challenging the statute.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our brief in the companion case, *Johnson* v. *Robison*, No. 72-1297, explains why 38 U.S.C. 211(a) validly bars judicial consideration of petitioners' constitutional challenges to the Veterans Readjustment

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observed that soldiers on active duty in the armed forces are subject to greater potential for hazardous duty and far greater limitations on personal freedoms (Pet. App. C 22-23). In addition, the court viewed the limitation of the educational benefit program to veterans of active duty as a reasonable method by which Congress could encourage enlistments (Pet. App. C 23).

The court also rejected petitioners' various First Amendment arguments. It held that "[t]here is no restriction placed on plaintiffs' religious opinions or actions by granting benefits to veterans. In fact the purpose of the conscientious objector exemption is to allow selective service registrants to follow their religious beliefs where they conflict with the purpose of the military" (Pet. App. C 23). The court also rejected petitioners' contention that the Act impermissibly supports religions represented by soldiers who have served on active duty. It found *Gillette* v. *United States*, 401 U.S. 437, dispositive of that contention, since there this Court rejected a virtually identical challenge to the conscientious objector provisions themselves (Pet. App. C 23-24).

Benefits Act. The discussion herein will therefore be limited to petitioners' arguments that are not fully covered in our *Robison* brief. We stress, however, that here, as in *Robison*, the Court may rest its decision on the insubstantiality of petitioners' constitutional arguments without considering the applicability of 38 U.S.C. 211(a) to these cases. Both courts below found the constitutional claims to be without merit.

We rely upon our brief in *Robison* to demonstrate that the language and legislative history of Section 211(a) indicate that it bars judicial consideration of the constitutionality of the Veterans Readjustment Benefits Act. Moreover, such preclusion of judicial review is also supported by the principle of sovereign immunity; the exception to that principle permitting suits to prevent federal officials from exercising powers which are constitutionally void does not apply here, since the relief sought would require affirmative action by the sovereign and the disbursement of sovereign property (*Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682, 691). In any event, the Act is not constitutionally void.

Petitioners have not been denied any hearing to which they are entitled under the Due Process Clause. They presented no disputed questions of fact bearing on their eligibility for benefits, and thus suffered no injury because no evidentiary hearing was held. In any event, the right asserted by petitioners is not one within the Fifth Amendment's protection of liberty and property, as defined by this Court in *Board of*

Regents v. *Roth*, 408 U.S. 564, and *Perry* v. *Sindermann*, 408 U.S. 593. Since the statute and regulations did not provide veterans benefits for petitioners, they did not have the reasonable expectation of receiving them which *Roth* and *Sindermann* indicate is essential to create property interests protected by the Fifth Amendment.

As shown in our *Robison* brief, the congressional decision to limit educational benefits to veterans of active duty has a rational basis, and thus does not deny petitioners equal protection of the laws in violation of the Fifth Amendment. Petitioners' contentions that their First Amendment right to the free exercise of religion is violated by denying them benefits granted to veterans, and that the Veterans Readjustment Benefits Act violates the First Amendment prohibition against any "law respecting an establishment of religion" are fully answered by this Court's opinion in *Gillette* v. *United States*, 401 U.S. 437.

ARGUMENT

I. 38 U.S.C. 211(a) REQUIRED DISMISSAL OF THIS SUIT.

Section 211(a) precludes judicial review of "decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans * * *." Petitioners contend that this provision does not cover constitutional challenges to such statutes. As petitioners themselves note, however, before the 1970 amendment the statute referred to "any question of law or fact concerning a claim for benefits or

payments under any law administered by the Veterans' Administration" (38 U.S.C. (1964 ed.) 211 (a)). The Administrator's decision denying benefits to petitioners was a determination of a question of law concerning a claim for benefits under a law administered by the Veterans Administration. Thus, even prior to its amendment in 1970, Section 211(a) would have barred judicial review of petitioners' constitutional contentions.

The 1970 amendment was intended to broaden, not to narrow, the limitations upon judicial review contained in Section 211(a). (See our brief in *Robison*, pp. 21-25.) The 1970 amendment was intended to "make it perfectly clear that the Congress intends to exclude from judicial review all determinations with respect to noncontractual benefits for veterans and their dependents and survivors." H. Rep. No. 91-1166, 91st Cong., 2d Sess., pp. 10-11.

Petitioners cannot avoid the bar of Section 211(a) on the theory that they are not raising a question "under" the Veterans Readjustment Benefits Act. The denial of benefits to petitioners was a decision that they are not entitled to benefits "under" that Act, and the benefits they seek to obtain in this suit similarly would be paid "under" that Act. The decision denying benefits is no less one rendered "under" that Act because it is subsequently challenged on the ground that the Act is unconstitutional.

A. Petitioners first urge that Congress may not constitutionally withhold from the courts jurisdiction to consider their constitutional claims, since such

action would violate the separation of powers.[4] We discuss in our brief in *Robison* (at pages 25-28) the permissible limitations on judicial review when administrative action involves no assertion of power over an individual, either to compel his compliance with a duty or to deprive him of liberty or property. Petitioners' argument that there may be no such limitations is based upon the assumption that Congress is obliged to confer on the courts all of the judicial power granted by the Constitution (Pet. Brief 16, n. 9).

This Court long ago decided otherwise (*Sheldon* v. *Sill*, 8 How. 441, 448-449):

> * * * And it would seem to follow, also, that having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.
>
> * * * * *
>
> "The political truth is, that the disposal of the judicial power (except in a few specified in-

[4] Of the cases cited by petitioners in support of this proposition, only *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, considers the power of the legislature to preclude judicial review of administrative actions; the administrative order there challenged fixed maximum rates for the company's services. The Court emphasized that "a large capital investment is involved and the main issue is as to the alleged confiscation of that investment." *Id.* at 49. This case, however, involves merely petitioners' desire to obtain benefits granted by Congress only to veterans of active duty.

stances) belongs to Congress; and Congress is not bound to enlarge the jurisdiction of the Federal courts to every subject, in every form which the Constitution might warrant." This decision was made in 1799; since that time, the same doctrine has been frequently asserted by this court, as may be seen in *McIntire* v. *Wood*, 7 Cranch, 506; *Kendall* v. *United States*, 12 Pet., 616; *Cary* v. *Curtis*, 3 How., 245.

Martin v. *Hunter's Lessee*, 1 Wheat. 304, cited by petitioner, contains earlier dicta inconsistent with this conclusion.[5] The difficulties with taking the discussion in *Martin* v. *Hunter's Lessee* as an accurate statement of the law are identified in Hart and Wechsler, *The Federal Courts and the Federal System*, pp. 313-315 (2d ed., 1973). The authors note that even Justice Story, the author of the opinion in *Martin* v. *Hunter's Lessee*, did not believe that there was any self-executing constitutional grant of jurisdiction, citing *White* v. *Fenner*, 29 Fed. Cas. No. 17,547 (C.C. R.I.) ("this [circuit] Court has no jurisdiction which is not given by some statute").

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[5] If petitioners' contention were correct, it would be unnecessary to identify any affirmative statutory basis for jurisdiction, since Congress would be without power to withhold jurisdiction in any case in which a constitutiional violation was alleged. But even in the absence of the explicit bar of Section 211(a), the court below would not have had jurisdiction in the absence of a statutory grant thereof. The district court in *Robison* made no finding concerning such a grant (see our brief in *Robison*, pp. 27-28, n. 25). Since the court below correctly relied on Section 211(a), it did not reach that issue.

B. The preclusion of judicial review is separately sustainable here under the principle of sovereign immunity. See *Lynch* v. *United States*, 292 U.S. 571. Petitioners seek to compel payment to them of federal funds under a federal statutory scheme which precludes judicial review. This is, therefore, an unconsented suit against the sovereign. *Land* v. *Dollar*, 330 U.S. 731, 738. Petitioners cannot obtain the relief they seek against the government from the courts. *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682; *Malone* v. *Bowdoin*, 369 U.S. 643; *Hawaii* v. *Gordon*, 373 U.S. 57; *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 141-143.

Petitioners contend (Br. 18-26) that their suit comes within the exception to sovereign immunity for suits against a governmental officer who acts under an unconstitutional statute. This Court explained the exception in *Larson* v. *Domestic and Foreign Corp.*, *supra*, 337 U.S. at 701-702, as follows:

> [T]he action of an officer of the sovereign (be it holding, or otherwise affecting the plaintiff's property) can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.

See also *Malone* v. *Bowdoin*, 369 U.S. 643, 647; *Dugan* v. *Rank*, 372 U.S. 609, 621-622.

This exception is inapplicable to this case. This Court pointed out in *Larson* that "a suit may fail,

as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Larson* v. *Domestic and Foreign Corp.*, *supra*, 337 U.S. at 691, n. 11. See also the dissenting opinion of Mr. Justice Frankfurter, 337 U.S. at 712-716, analyzing the cases involving the exception, and noting that it does not apply to cases in which the relief requested would mean that "Government property would have to be transferred, or cases where the person sued could satisfy the court decree only by acting in an official capacity." *Id.* at 713. Here, the petitioners seek affirmative relief—payment of educational benefits—which requires the disposition to them of "unquestionably sovereign property"—that is, federal funds which Congress has not directed to be paid to them.* Furthermore, the Administrator could satisfy a decree ordering him to pay benefits to petitioners only by acting in his official capacity.

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* This case is thus very different from the cases relied upon by petitioner, such as *United States* v. *Lee*, 106 U.S. 196, which involve allegations of unconstitutional governmental interference with plaintiffs' private property. This Court has emphasized that difference by limiting *Lee* to situations involving claims of "an unconstitutional taking of property without just compensation." *Malone* v. *Bowdoin*, *supra*, 369 U.S. at 648, citing *Larson* v. *Domestic and Foreign Corp.*, *supra*, 337 U.S. at 697.

In any event, there is no basis for petitioners' contention that the Administrator is acting under an unconstitutional statute. The Veterans Readjustment Benefits Act satisfies both the First and Fifth Amendments (see *infra*, pp. 18-23).[7] Since the Administrator's exercise of his statutory powers is not constitutionally void, the exception does not apply. See *Dugan* v. *Rank*, 372 U.S. 609, 621-622.

C. Petitioners further contend, relying upon this Court's rulings in such cases as *Goldberg* v. *Kelly*, 397 U.S. 254, *Board of Regents* v. *Roth*, 408 U.S. 564, and *Perry* v. *Sindermann*, 408 U.S. 593, that application of Section 211(a) denies them a hearing in violation of the Due Process Clause of the Fifth Amendment.

The hearing contemplated in those cases, however, is an evidentiary hearing, which is required where "important decisions turn on questions of fact." *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 269. See also

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[7] Consideration of the merits of the constitutional question is, strictly speaking, somewhat inconsistent with Section 211(a). However, this procedure is similar to the preliminary decision which a district court must make in determining whether a case presents a substantial constitutional question which would require a three-judge district court. In addition, this practical approach is a logical corrolary to the principles of the *Larson* case. Cf. *Land* v. *Dollar*, *supra*, 330 U.S. at 735. Compare also *Delaware Valley Conservation Association* v. *Resor*, 392 F.2d 331, 335 (C.A. 3), certiorari denied, 393 U.S. 915, where the court stated that "[t]he mere allegation of unconstitutional actions * * * does not deprive the court of its authority to dismiss a complaint since the court must examine those allegations and order dismissal where they are wholly without merit."

Mills v. *Richardson*, 464 F. 2d 995, 1001 (C.A. 2). Here, there are no disputed questions of fact which bear on petitioners' eligibility for benefits. The issue is solely one of law, and neither the Veterans Administration nor the courts would have been aided in deciding whether petitioners were entitled to benefits by the development of facts at an evidentiary hearing. Indeed, petitioners point to no relevant facts they were precluded from presenting to the Administration because of the lack of a hearing.[8]

In any event, petitioners' invocation of the Due Process Clause is misplaced. The right petitioners assert—to educational benefits—is not within the protection of that Clause.

This Court recently stated that "to determine whether due process requirements apply in the first place, we must look * * * to the *nature* of the interest at stake. We must look to see if the interest is within the [Fifth] Amendment's protection of liberty and property." *Board of Regents* v. *Roth*, 408 U.S. 564, 570-571 (emphasis in original). Accord, *Perry* v. *Sindermann*, 408 U.S. 593, 599. Petitioners assert that their claim of entitlement to educational bene-

[8] If petitioners had any facts bearing on their claim, they could have presented those facts in affidavits or other documentary form. This Court has never indicated that procedural due process requires a full hearing simply because the actions involved affect individual interests. Instead, it has specifically recognized the "constitutional power of Congress to devise differing administrative and legal procedures appropriate for the disposition of issues affecting interests widely varying in kind." *Communications Commission* v. *WJR*, 337 U.S. 265, 276.

fits constitutes a sufficient property interest to bring them within the Fifth Amendment's protection, relying on *Roth* and *Sindermann*. But those cases teach that (*Roth, supra*, 408 U.S. at 577):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg* v. *Kelly, supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Accord, *Perry* v. *Sindermann, supra*, 408 U.S. at 601, 602, n. 7.

The employment rights of the teachers involved in both *Roth* and *Sindermann* were defined by the terms of their contracts and the policies of the universities at which they taught. Since in *Roth* there was nothing in the contract or "anything approaching a 'common-law' of re-employment" (*Roth, supra,* 408 U.S. at 578, n. 16) in the university policies, Roth had no property interests subject to constitutional protection. In *Sindermann,* there were allegations of "rules and understandings, promulgated and fostered by state officials" (*Sindermann, supra,* 408 U.S. at 602), which would constitute an implied contract to rehire sufficient to create a constitutionally protected property interest. The difference between the two cases is thus precisely that, although Roth had "an abstract concern in being rehired" (*Roth, supra,* 408 U.S. at 578), he could show no property interest absent a continuous administrative practice giving rise to a reasonable expectation of re-employment of the sort alleged in *Sindermann.*

In the instant case, petitioners cannot even claim a property interest of the stature of that in *Roth,* where at least there was no clear legislative intent that the benefit sought should not be granted, nor long-standing administrative practice denying it. Petitioners therefore cannot have had any reasonable expectation that they would receive educational benefits as a result of performing alternative civilian service.

Petitioners attempt to avoid the thrust of *Roth* and *Sindermann* by asserting that the Veterans Read-

justment Benefits Act and the Constitution create a sufficient property interest to meet the test of those cases. But the Act cannot create any property interest in petitioners, since it does not grant them benefits. Moreover, this Court in *Roth* (408 U.S. at 577) stated that "property interests, of course, are not created by the Constitution." In short, petitioners cannot point to any "rules or mutually explicit understandings that support [their] claim of entitlement to the benefit." *Sindermann, supra,* 408 U.S. at 601. Thus, under this Court's decisions in *Roth* and *Sindermann,* they have shown no interest entitled to constitutional protection.

II. THE VETERANS READJUSTMENT BENEFITS ACT OF 1966 IS CONSTITUTIONAL.

The district court based its dismissal of the present actions on the alternative ground that petitioners' challenges to the Veterans Readjustment Benefits were "insubstantial and without merit" (Pet. App. C 24). In affirming the dismissal of the actions under Section 211(a), the court of appeals agreed with that analysis, holding that "the facts alleged in the present case do not present a substantial basis for challenging [Section 211(a)]" (Pet. App. A 16).

Since this Court may affirm the judgment below on any ground having support in the record, *Dandridge* v. *Williams,* 397 U.S. 471, 475-476, n. 6, *Jaffke* v. *Dunham,* 352 U.S. 280, we now demonstrate that the judgment below can properly be affirmed on the

alternative ground that the Veterans Readjustment Benefits Act is constitutional.[9]

A. The Veterans Readjustment Benefits Act satisfies the Due Process Clause of the Fifth Amendment.

Petitioners' due process challenge here is identical to that made in *Robison*. They contend that the Veterans Readjustment Benefits Act violates the equal protection guarantee of the Due Process Clause, since it does not provide educational benefits to conscientious objectors who have performed civilian alternative service, but makes such benefits available only to veterans who have served on active duty. The district court, after carefully reviewing the Act in

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[9] Here, as in *Robison*, the case was properly decided initially by a single judge rather than by a three-judge district court. There is therefore no need for this Court to remand for consideration under 28 U.S.C. 2282. The district court in the instant case ruled that the constitutional challenges were too insubstantial to warrant convening of a three-judge court, and then dismissed the action on the merits. The court acted correctly. See *Ex parte Poresky*, 290 U.S. 30; *Lion Manufacturing Corp.* v. *Kennedy*, 330 F. 2d 833, 840-841 (C.A.D.C.), motion for leave to file petition for writ of mandamus denied *sub nom. Lion Manufacturing Corp.* v. *McGuire*, 373 U.S. 920.

This Court need not reach that question, however, since a three-judge court was unnecessary for a separate reason. As we have shown in our *Robison* brief, pp. 9-12, the relief sought by petitioners (if otherwise within the jurisdiction of the district court) could have been effectively granted through a declaratory judgment without an injunction against enforcement of the statute. See *Majuri* v. *United States*, 431 F. 2d 469, 472-473 (C.A. 3), certiorari denied, 400 U.S. 943; *Sellers* v. *Regents of University of California*, 432 F. 2d 493, 498 (C.A. 9), certiorari denied, 401 U.S. 981.

light of petitioners' contentions, held that "the classification scheme is neither arbitrary or unreasonable and therefore clearly could not violate the Fifth Amendment" (Pet. App. C 23).

In our *Robison* brief (pp. 13-20), we show that this conclusion is correct, and that the Act satisfies due process. We refer the Court to that discussion on this phase of the case.

B. The Act does not violate the First Amendment.

Petitioners' contentions in the courts below in effect raised two First Amendment challenges to the Act: (1) that the Act prohibits the free exercise of their religion and (2) that it is a law respecting an establishment of religion. Neither claim is sound.

(1) *The Free Exercise Claim.*

The short and conclusive answer to petitioners' free exercise claim is that the statute in no way coerces them in the exercise of their religious beliefs.

"[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Abington School District* v. *Schempp*, 374 U.S. 203, 223. Accord: *Board of Education* v. *Allen*, 392 U.S. 236, 248-249. As the district court correctly noted, "[t]here is no restriction placed on plaintiffs' religious opinions or actions by granting benefits to veterans. In fact the purpose of the conscientious objector exemption is to allow selective service registrants to follow their religious beliefs where they conflict with the purpose of the military" (Pet. App.

C 23). Indeed, the selective service statute itself reflects respect for, rather than interference with, petitioners' religious beliefs by affording them a special exemption from all military service.[10]

Petitioners contend that the Veterans Readjustment Benefits Act interferes with the free exercise of their religion because it in effect penalizes the assertion of their religiously motivated conscientious-objector claim by denying them the benefits available to veterans. This Court's recent decision in *Gillette* v. *United States*, 401 U.S. 437, however, shows that such indirect effect upon the exercise of petitioners' religion does not violate the Free Exercise Clause. The Court there stated (*id.* at 462):

> The conscription laws, applied to [selective conscientious objectors] as to others, are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position. The incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned. And more broadly, of course, there is the Government's interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies. Art. I, § 8.

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[10] As this Court noted in *Gillette* v. *United States*, 401 U.S. 437, 445, "the legislative materials reveal a deep concern for the situation of conscientious objectors to war * * * [and] respect for the general proposition that fundamental principles of conscience and religious duty may sometimes override the demands of the secular state."

Any indirect burden on religion which might result from the denial of benefits to conscientious objectors who performed civilian service similarly does not constitute an impermissible burden on the free exercise of religion. Indeed, the present case is *a fortiori* under *Gillette*, since the denial of veterans benefits has none of the coercive effects of the draft law involved in *Gillette*.

(2) ***The Establishment Clause Claim.***

As the district court properly held, *Gillette* v. *United States*, *supra*, is also dispositive of petitioners' Establishment Clause argument.

In *Gillette*, plaintiffs were selective conscientious objectors who—because of their religious beliefs—refused to participate in the Vietnam war but not in other wars. They challenged the provision of the Selective Service Act limiting conscientious objector status to persons who refused to participate in all wars on the same First Amendment grounds here raised: that is, that the Act impermissibly discriminates among types of religious beliefs. In rejecting this Establishment Clause claim, this Court emphasized that the statute "on its face, simply does not discriminate on the basis of religious affiliation or religious belief * * *" (*id.* at 450). Instead, it "serves a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions" (*id.* at 452). Since there is a "neutral, secular justification for the lines Congress

has drawn" the Establishment Clause is not violated (*id.* at 460).[11]

The same considerations apply with equal if not greater force in the present case. Here, too, the statute does not discriminate on the basis of religion, and does not foster or favor any particular religion any more than do the conscientious objector provisions themselves. Moreover, the veterans' benefit provisions serve the neutral, secular purposes of compensating persons who have served on active duty in the armed forces, with all its greater risks, limitations and disruptions, and encouraging enlistment in the armed forces—purposes which provide a neutral secular justification for the limitation of benefits which Congress has imposed.

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[11] Neither *Gillette* nor this case involves any questions of governmental entanglement in religious practices of the sort which were considered in *Committee for Public Education* v. *Nyquist*, Nos. 72-694, 72-753, 72-791, and 72-929, decided June 25, 1973.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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